



Summary of the EPCRA Section 313 Reporting Requirements and the National Mining Association (NMA) Lawsuit

In May 1998, the National Mining Association (NMA) filed a lawsuit challenging EPA's 1997 Industry Expansion rulemaking which added, among others, the mining industry to the universe of facilities subject to section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA).

In its complaint NMA challenged:

- (1) EPA's authority to extend section 313 reporting obligations to mining operations;
- (2) EPA's interpretation in the 1997 rulemaking that facilities were required to report the extraction and beneficiation of ores, as "processing," on the grounds that the TRI chemicals contained in the ores had been manufactured prior to their extraction and beneficiation; and,
- (3) EPA's interpretation that section 313 requires reporting of the quantity of toxic chemicals placed in containment units at mines.

On January 16, 2001, the District Court issued an Order and Opinion, and then a revised Order on March 30, 2001:

- The Court upheld EPA's authority to add the mining industry.
- The Court also upheld EPA's interpretation that mining facilities must report their releases to land including into landfills.
- The Court set aside EPA's interpretation in its 1997 rulemaking that the extraction and beneficiation of undisturbed ores fall within EPCRA section 313's definition of "processing," on the grounds that "naturally occurring, undisturbed ores are not manufactured within the meaning of [EPCRA section 313]." Order of Clarification, p.3.
- In its revised Order, the Court made clear that it had not addressed the issue of whether the term manufacture includes extraction and beneficiation activities, and that the Order "merely addressed the issue of whether naturally occurring undisturbed ores are 'manufactured' within the meaning of [EPCRA section 313]. Order of Clarification, p.3.

On April 23, 2001, counsel for NMA submitted a letter to EPA stating that NMA "believes its members presently are not legally required to include, in their calculations of the amount of toxic chemicals that are 'processed' or

'manufactured' at mining facilities, toxic chemicals that are present in ores during extraction and beneficiation activities. Counsel for NMA also expressed their understanding that at the present time, mining facilities are not legally obligated to report on manufacturing that may take place during beneficiation.

EPA issued a response to the April 23, 2001 letter (PDF) to clarify the extent and effect of the Court's Order. In the response, EPA notes that the Agency concluded in its 1997 rulemaking that extraction and beneficiation constituted "preparation" of the toxic chemicals in the ore, and that the Court had not set this finding aside. EPA also notes that the plain language of EPCRA section 313 explicitly identifies "preparation" of a toxic chemical as a threshold activity. EPA's letter does not allocate particular preparatory activities as "manufacturing" or "processing"; rather the Agency intends to initiate a rulemaking to adopt a revised interpretation that will allocate extraction and beneficiation between those two statutory terms. Until this rulemaking is completed, individual facilities will remain responsible for determining whether their preparation of toxic chemicals in ore is better characterized as "manufacturing" or "processing."

The response emphasizes that the Court's Order only addresses EPA's interpretation that naturally occurring undisturbed ores had been "manufactured" by natural forces, and that, therefore, the extraction and beneficiation of those ores constitutes the "processing" of the toxic chemicals contained in those ores. The Court explicitly declined to reach the question of whether manufacturing that occurs during the course of extraction and beneficiation is an EPCRA section 313 threshold activity. Accordingly, facilities must continue to consider toward their manufacturing thresholds any toxic chemicals generated during extraction and beneficiation that were not present in the naturally occurring, undisturbed ores. This includes newly generated toxic chemical compounds from another compound within the same listed compound category (*e.g.*, copper sulfate from copper sulfide).

Further, just because a particular quantity of a toxic chemical is not considered toward an activity threshold does not mean that releases of that particular quantity of the toxic chemical are not reportable if an activity threshold for that same toxic chemical or chemical category is exceeded elsewhere at the facility.

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